



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

MAY 19 1994

OFFICE OF THE
REGIONAL ADMINISTRATOR

Dr. James M. Lents, Ph.D.
Executive Officer
South Coast Air Quality Management District
21865 East Copley Drive
Diamond Bar, California 91765-4182

Re: Request for Reconsideration of Draft Rule 201
Interpretation

Dear Dr. Lents:

Thank you for your letter of February 25, 1994, asking me to reconsider your proposal to interpret District Rule 201 to allow certain on-site construction activities prior to issuance of an authority to construct permit. I have considered your request and arguments carefully. I understand the difficult situations that can arise because the permittees are eager to begin construction and the connection between early construction work and final air quality permits is not always obvious. However, that connection does exist and is at the heart of EPA's longstanding preconstruction review program. As a result, we continue to believe that your proposed interpretation of Rule 201 is impermissible under federal law, for the reasons stated below and in David Howekamp's letter of December 3, 1993.

Your letter delineates three factors upon which the draft rule interpretation is based. First, you offer that construction of foundations and structural supports that are not integrally related to emitting equipment should not be considered to be subject to the same requirements as construction of the equipment which may cause the issuance of air contaminants. From this, you conclude that Rule 201 need only prohibit activities constituting construction of the emitting equipment. You also note that construction of foundations and non-integral building supports does not result in an unalterable commitment. EPA does not agree with this reasoning. The Agency has not drawn the distinction (between "integral" and "non-integral" building supports) you are requesting. Rather, EPA prohibits permanent on-site construction activities. Our policy is based on 40 C.F.R. §§ 51.165(a)(1)(xv), 51.166(b)(11) and 52.21(b)(11), which define "begin actual construction." The definition includes installing building supports and foundations because such activities generally commit the project to a specific design. For example, foundations are designed for the ultimate structure and often

cannot easily be altered if structural changes are later required during the permitting and public comment period required by the Clean Air Act.

The Agency's prohibition against permanent on-site activities, such as pouring foundations and installing building supports, is a longstanding policy which is applied nationally. It ultimately derives from the preconstruction review requirements of Section 110(a)(2)(C) and Part D of Title I of the Clean Air Act. As we explained in our letter of December 3, 1993, the purposes of Section 110(a)(2)(C) would be frustrated if an owner or operator could lawfully initiate the construction related activities you are requesting prior to permit issuance.

The second factor you raise is that Rule 219 exempts structural changes not affecting emissions from permitting requirements. This rule applies to existing sources which were constructed in compliance with a permit and for which the substantial capital expenditures have already occurred. On this basis, these activities are distinguishable from initial permanent on-site construction activities which by virtue of their physical nature or financial consequence represent an initial step of putting equity in the ground. As discussed in our previous letter, equity in the ground compromises the ability of permitting authorities to issue an after-the-fact permit that fulfills the statutory purpose of new source review. The Agency, therefore, disagrees that Rule 219 provides support for your draft rule interpretation.

The third factor you discuss is that the language of Rule 201 does not explicitly prohibit storage of prefabricated equipment and that therefore such storage should not be subject to permitting requirements. Although temporary on-site storage is allowed under appropriate circumstances, 40 C.F.R. §§ 51.165(a)(1)(xv), 51.166(b)(11) and 52.21(b)(11) prohibit activities of a permanent nature. You are requesting EPA to allow on-site storage of emissions units at its proposed final location and construction of any structure that is not an integral part of the emissions unit. In combination then, based on the factors you have raised, a permit would be required neither for constructing a building that is not an integral part of the emissions unit nor for placing the emissions unit within it. All construction activities short of hooking up or turning on the emissions unit, thus, could occur without obtaining a permit. EPA views this as setting the stage for significant erosion of the permitting requirements in Part D of the Clean Air Act and Rule 201 as approved into the SIP. Thus, to be acceptable to the Agency, the permanent on-site storage of emission units must be prohibited under the interpretation of Rule 201.

I know that you can appreciate the necessity of maintaining national consistency on this important issue. Indeed, EPA considers the prohibition against permanent construction activities to be fundamental to the regulatory framework supporting our prevention of significant deterioration and new source review programs throughout the country. Your letter suggests, however, that Region 9 has flexibility to retreat from established, national policy because the statute and regulations can be interpreted in more than one way. We disagree, and indeed, our issuance of a Memorandum to the Air Resources Board and local air districts on November 4, 1993, reflects our commitment to maintain consistency on this issue. Your letter also indicates that many districts may not have applied the prohibition against on-site activities rigorously in the past. Our Memorandum dated November 4, 1993, is intended to correct that situation, and we have received word from other districts that they understand the prohibition and will comply with it.

Rather than alter this longstanding interpretation of preconstruction review requirements, the better course is one which clarifies to the potential permittees the necessity of submitting their permit applications to the permitting agency with adequate lead time for environmental and preconstruction review. Then, the reviewing agencies must fulfill their obligation to process those applications in a timely manner. Such a course of action can both serve the public's need for improved air quality while satisfying industry's need for timely progress on construction projects.

Yours,

A handwritten signature in black ink, appearing to read "Felicia Marcus", written in a cursive style.

Felicia Marcus
Regional Administrator

cc: Peter Greenwald, District Counsel